

NINTH CIRCUIT COURT OF APPEALS PRO BONO PROGRAM

The Ninth Circuit Court of Appeals established its expanded and revised pro bono program in 1993 to provide pro bono counsel to pro se parties with meritorious or complex appeals, to provide a valuable learning experience to young attorneys and law students, and to assist the court in processing pro se civil appeals more equitably and efficiently.

The program was adopted by the court in June 1993 and has been fully implemented since November 1993. The goal of the program is to provide pro bono counsel to pro se parties in all civil appeals in which briefing and argument by counsel would benefit the court's review. (A copy of *1993 Resolution No. 3* is attached.) All appeals selected for inclusion in the program have been pre-screened by a staff attorney and/or a panel of judges for a determination of the propriety of its inclusion. Only cases presenting issues of first impression or some complexity, or cases otherwise warranting further briefing and oral argument, will be selected for the appointment of counsel under the program.

Without the time, resources, or expertise of staff attorneys available to the judges in the more complex pro se cases previously processed without counsel on regular argument calendars, the lack of an articulate (or even legible) brief made it difficult to handle these appeals efficiently. Further, since the selected appeals are generally more complex than the average pro se case presented by staff attorneys to oral screening panels, counsel is needed to assist the court to ensure that pro se cases receive the same attention as other cases of similar complexity.

The program is based in large part on the cooperation and volunteer efforts of the private bar, and on the court's commitment to providing a valuable learning experience to participating attorneys and law students. Panels of private volunteer attorneys in each district of the circuit are coordinated and maintained by an attorney in each district serving as district coordinator for the program. The court's pro bono coordinator works with and relies heavily upon the district coordinators in locating counsel for each appeal and for recruiting volunteers for the program. (A copy of the *Attorney Sign-Up* and the contact information for the district coordinators is attached.) The court has committed to hearing oral

argument in all cases selected for the program, which should further enhance the experience of participating attorneys and students.

APPEALS SELECTED FOR PROGRAM

Approximately forty percent of all new appeals filed in the Ninth Circuit have at least one party who is proceeding pro se. All new pro se civil appeals (including habeas petitions) are reviewed at the outset by court staff for jurisdictional defects and are dismissed early on if no jurisdiction exists. Still others are dismissed for failure to prosecute or otherwise summarily disposed of during the course of the appeal. Many of the remaining pro se appeals (primarily those determined after the completion of briefing by staff and/or judges to meet the criteria set forth in 9th Cir. Rule 34-4 to be submitted without oral argument) are processed on the merits by staff attorneys through presentation to oral screening panels.

The remaining pro se appeals (primarily those determined by staff attorneys or judges to warrant further briefing and/or oral argument) are reviewed by the court's pro bono coordinator, under the supervision of a staff attorney, for a determination whether counsel should be appointed. Direct criminal (and most habeas corpus) appeals are not included in the program because the appellants are entitled to paid counsel under the Criminal Justice Act and because any such appellant proceeding pro se is probably doing so out of choice. Civil and habeas corpus appeals presenting issues of first impression, complex issues of fact or law, or raising meritorious claims warranting further briefing are selected for inclusion in the program.

In addition to the appeals referred after briefing by staff attorneys or judges and reviewed by the coordinator for inclusion in the program, other pro se civil appeals are referred to the coordinator for similar review. Appeals that have been initially referred or submitted to oral screening panels are sometimes considered to be too complex for the oral screening process or require further briefing and/or oral argument for some other reason. These appeals are "kicked" from the screening process by staff attorneys or oral screening panels and referred to the coordinator for inclusion in the program. Still other appeals are referred by motions panels or staff attorneys prior to the initial briefing and inventory process on the basis of a motion for appointment of counsel and a review of the district court record.

One measure of the usefulness of the court's pre-screening process, and of the success of the program generally, is that the success rate for the pro bono attorneys and law students participating in the program has been 50% (at least partial reversal or other termination favorable to pro bono client) every year since the inception of the program.

Cases selected for inclusion in the program include a broad range of legal issues. While a significant percentage of the cases are prisoner civil rights appeals or immigration petitions, many other civil cases are included, such as labor and employment cases, discrimination, bankruptcy, social security, habeas corpus, Indian law, mining law, contract and civil forfeiture appeals.

In sum, program cases are generally (though not exclusively) selected after briefing and inventory have been completed. This allows staff to more fully evaluate the merits of the appeal and allows the court to assure participating counsel that only meritorious or otherwise deserving cases will be selected for the program. Supplemental briefing is ordered when counsel is appointed and counsel then has access to all previous filings in this court as well as the district court or agency record.

PROCEDURES FOR APPOINTING COUNSEL

Upon referral of all qualified pro se appeals to the pro bono coordinator for review, the supervising staff attorney determines whether the appeal warrants inclusion in the program. The coordinator and/or staff attorney makes recommendations regarding program selection to the Appellate Commissioner or the next available motions panel, for entry of an order authorizing the Clerk to appoint pro bono counsel in each of the appeals selected for the program. (A sample order placing a case in the pro bono program is attached.)

The court's coordinator next contacts the district coordinator for the district in which counsel is to be appointed. She forwards the briefs already filed, where applicable, and the excerpts of record or selected portions of the record to the district coordinator, along with the order authorizing the appointment of counsel. The district coordinator uses these materials to locate available counsel, who will have the opportunity to familiarize themselves with the issues on appeal, the history of the case, and the parties involved before committing themselves to the appointment. Pro bono counsel must be a member of the bar of the Ninth Circuit.

If no attorney is available for a given appeal in a given district, the court's coordinator will contact a district coordinator from another district or will solicit a participating law school clinic within the circuit to handle the appeal. If a volunteer attorney reviews the briefs and/or other materials and determines that no arguable basis exists for the appeal, the court coordinator will contact the authorizing judges or Commissioner and discuss the propriety of vacating the order selecting the case for the program.

Once willing and available counsel has been located for an appeal, the court's coordinator works with him or her to formulate a mutually acceptable briefing schedule and to coordinate other details, such as the attorney's review of the entire district court record. The court's coordinator will then enter a Clerk's order appointing the attorney as counsel of record, establishing a supplemental briefing schedule, and providing for other relevant details, such as transmission of the record and the location of oral argument. As with the panel or commissioner order authorizing the appointment, the order will provide the pro se litigant with an opportunity to object to the appointment of counsel. (A sample order of appointment is attached.) The coordinator also sends counsel a letter confirming the appointment and setting forth the relevant aspects of the program. (A sample confirmation letter, with *Guidelines for Reimbursement of Costs* and the *Evaluation and Comments Form* is attached.) Finally, pro bono counsel is advised to send a letter to the client outlining the terms of the representation agreement and to obtain the client's written consent. (A sample representation letter is attached.)

The court's Pro Bono Coordinator will work with appointed counsel in all respects to assist them in substituting into the appeal and to process all further motions in the appeal, including requests for modification of the briefing schedule, motions to withdraw as counsel, and cost reimbursement requests. Where appropriate, counsel may request that the appeal be included in the court's pre-briefing settlement conference program.

COSTS, SCOPE OF APPOINTMENT AND ORAL ARGUMENT

The order of appointment provides that pro bono counsel will be appointed to represent the appellant "for the purposes of this appeal only." Accordingly, the appointment includes only the handling of the appeal and the drafting of a petition for rehearing where requested by the client, but does not include the preparation

and filing of a petition for certiorari in the Supreme Court or any other proceedings in any other court or agency unless specifically requested by this court or agreed upon between the attorney and the client.

If circumstances arise that require counsel to withdraw as counsel for appellant, such a motion may be based on any of the established grounds for doing so. A motion to withdraw will not generally be disfavored solely on the basis that it would result in further delay unless such delay would severely prejudice the litigants.

Funds are available to reimburse counsel for reasonable and necessary out of pocket expenses, including preparation of the briefs and travel to oral argument. The court's guidelines for reimbursable costs are attached to the sample confirmation letter to appointed counsel. In some limited habeas corpus appeals, additional funds may be available through the Criminal Justice Act. In addition, statutory attorneys' fees are available to pro bono counsel in civil cases to the same extent that they are available to retained counsel.

In most cases, every attempt will be made to appoint counsel from the same district in which the appeal will be argued. The court has committed to hearing oral argument in all cases in which pro bono counsel is appointed through the program. Gen. Order 3.8. (In cases where appointment is for mediation purposes, the court may not guarantee briefing or argument. Counsel may withdraw if mediation is not successful.) When counsel is appointed, court staff implement several internal court procedures designed to notify the merits panel of the appeal's inclusion in the program.

DISTRICT VOLUNTEER PANELS

Most districts in the circuit have a district coordinator who recruits volunteer attorneys for the program, maintains the current list of volunteers, and locates individual attorneys to accept specific appointments. The district coordinator is generally the chair of that district's delegation of attorney representatives to the Ninth Circuit Judicial Conference or is someone named by that person. The attorney sign-up form and district coordinator contact information is attached.

The district coordinators recruit volunteers through a variety of methods. Advertisements or announcements in local bar association newsletters or at local bar events have proved very successful in recruiting volunteers. Word of mouth works well in smaller legal communities. Another important resource is the annual class of new lawyer representatives to the Ninth Circuit Judicial Conference, who can be recruited to volunteer for appointments and/or to recruit their colleagues to do so.

The Ninth Circuit Lawyer Representatives, together with the Ninth Circuit Senior Advisory Board, have made a commitment to participation in the program, both in terms of volunteering to accept appointments and assisting in the recruitment of other volunteer attorneys. The Lawyer Representatives Coordinating Committee and the Senior Advisory Board sponsored a joint resolution urging circuit-wide participation in the program by the private bar, which was adopted by the Ninth Circuit Judicial Conference in August, 1993. The resolution as adopted is attached.

The scope of the commitment asked of the volunteer attorneys is fairly limited. Given the number of appeals selected for inclusion in the program, between five and ten per month circuit wide, each volunteer should expect to be called upon no more than once annually to accept an appointment. In addition, the limited scope of the representation of a litigant on appeal is very attractive as a manageable pro bono commitment. Finally, the commitment to hearing oral argument in these cases, the reimbursement of costs and the pre-screening of the appeals selected for the program provide strong incentives for participation.

LAW SCHOOL CLINIC PARTICIPATION

The Ninth Circuit has historically worked in cooperation with certain law school clinics in the circuit to appoint law students under the supervision of a professor to represent pro se litigants. Pursuant to 9th Cir. R. 46-4, law students supervised by an attorney admitted to this court may appear on behalf of any client with the written consent of that client. This program began solely as a learning experience for the students without much regard to the need for counsel in specific appeals, but is now an integral part of the pro bono program and includes the same, carefully screened cases selected for the program as those handled by the private bar.

With the expansion of the pro bono program, the court has recruited additional law schools to participate. Cases are sometimes referred to these law schools for appointment either because they have been difficult to place in the district of origin for some reason or because the school has requested a specific number of cases of a particular type.

When a law school is appointed, the same procedures are followed as described above, except that the court's coordinator deals directly with the law school rather than enlisting the aid of a district coordinator. In addition to providing the litigant with an opportunity to object to the appointment of counsel, the law school must obtain the written consent of the litigant to representation by a law student under the supervision of a professor. The student, the supervising attorney and the dean must also file certification forms. (Forms are attached.)

CONCLUSION

The pro bono program offers attorneys and law students a valuable learning experience while providing pro se litigants with meritorious or complex appeals access to quality representation, and benefits the court in the increased efficiency and effectiveness of its review of such cases.

Any questions regarding the implementation of the program or about volunteering in a particular district should be directed to the court's pro bono coordinator at the address below.

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